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In the Supreme Court of the United States

OCTOBER TERM, 1993

PRINCE S.J. WEBBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Constitution permits the use of a court-martial panel consisting of five members who may convict on a vote of two-thirds of the members.

2. Whether the facts relied upon as a basis for issuance of the search authorization in this case established probable cause.

3. Whether the evidence was sufficient to support petitioner's conviction.

4. Whether the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, may appoint commissioned officers to serve as military trial and appellate judges.

5. Whether military trial and appellate judges must be appointed to their judicial duties for fixed terms.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a) is unreported. The opinion of the Air Force Court of Military Review (Pet. App. 2a-10a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 12, 1993. The petition for a writ of certiorari was filed on November 9, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Petitioner, a member of the United States Air Force, was convicted after a general court-martial of rape, larceny, burglary, and indecent assault, in violation of Articles 120, 121, 129, and 134 of the Uniform Code of Military Justice, 10 U.S.C. 920, 921, 929, and 934. He was sentenced to a dishonorable discharge, confinement for 40 years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence. Pet. App. 3a. The Court of Military Appeals granted discretionary review on two issues, which are raised before this Court in Questions 4 and 5 above, but it denied the petition for new trial and otherwise affirmed the decision of the court of military review. *Id.* at 1a.

The victim of the rape and the other charged offenses, Airman Linda Jean Nantkes, lived in a women's dormitory at Kirtland Air Force Base in New Mexico. On September 11, 1990, she went to sleep at about 10 p.m. in her room. Soon afterward she was awakened by a knock at her door. She asked who was at the door. Her visitor answered with a muffled reply that sounded like "It's Webber." On opening the door the victim saw a black man, later determined to be petitioner, who told her that her windows were open. When she said her windows were not open, the man said, "Well, I mean your shades or your blinds are open." Nantkes said, "Okay," and shut the door. She went to the shades, which were open just a crack, but not enough that someone could see into her room.

Nantkes then returned to her bed and went to sleep. Tr. 225-227, 253-254.

At about 4:30 a.m., Nantkes awoke to find a man standing by her bed touching her groin area. She could not see the man well, but believed him to be a black man. The assailant covered her mouth, turned her onto her stomach, and raped her. Tr. 228-229, 236. The assailant then put a pillowcase over her head before turning her back over on her back and raping her a second time. Tr. 229-231. After forcing her to shower with him, the pillowcase still over her head, the assailant covered her head with a towel and raped her a third time. Tr. 232-234. Nantkes subsequently noticed that the nightgown she had been wearing before the attack was missing from her room. Tr. 238.

Although Nantkes was unable to identify her assailant, she was able to describe the person who announced himself as "Webber" when he knocked at her door the previous night. Tr. 226-227. She also was able to assist the agents in creating a composite picture of that person. She described him as black, about 20 years old, about 5'3" to 5'5" tall, and of slender build. Tr. 227, 238, 259-260; Pros. Exh. 4. In addition, she testified that she perceived the accent of the assailant's voice as that of a black man; that when the assailant forced her to put her arms around him she perceived his height to be similar to hers, 5'4"; and that his build was slender. Tr. 227, 230, 233.

Agents investigating the incident learned that male servicemembers from a dormitory across the street often frequented the women's dormitory. Tr. 260-261. The agents then conducted a door-to-door inquiry at the men's dormitory. One of the agents encountered petitioner and recognized him as the person depicted

in the composite picture that had been prepared from Nantkes' description of the man who had visited her on the night of the rape. Tr. 259, 261. When asked if he knew anyone who matched the composite picture, petitioner said that the picture looked like a man who had been living in a room down the hall. None of the occupants of that room matched the picture. Tr. 262.

Upon interviewing petitioner, the agents learned that his last name was Webber. Tr. 262. In the course of discussion with one of the agents, petitioner said that on the previous night he had walked by the women's dormitory across the street from the transients' dormitory; that he noticed an individual who appeared to be looking at a woman undressing in the window of the female dormitory; that as he approached, the individual walked off; and that he knocked on the woman's door and informed her that her shades were open. Tr. 263. The agents then obtained oral probable cause search authority—the military equivalent of a warrant—to search petitioner's room for, among other items, the missing nightgown. Tr. 263-264. In the course of the ensuing search, the agents found the nightgown under a seat cushion in petitioner's apartment. When the agents found the gown, petitioner exclaimed spontaneously, "Oh, shit!" Tr. 264, 294. The agents then sought and obtained a further authorization to search for other evidence related to the rape. They then found a handwritten note containing Nantkes' name. The note was written in petitioner's handwriting. Tr. 264-265, 331.

Physical evidence from the crime scene was seized and later examined. A serologist testified that, by using the ABO test, he determined that the semen

found on the victim's nightshirt matched petitioner's saliva type.[1] Tr. 307-309. On the basis of that test, the serologist testified that 75% of black males could be excluded as the originators of the stains, but that petitioner could not be excluded. Tr. 309. A second type of test did not establish a match between the samples at the crime scene and the fluid sample taken from petitioner. The serologist offered three possible explanations for that result: that the semen stains did not originate from petitioner; that the pertinent enzymes detected in the second test had deteriorated by the time of the test; or that the samples that were tested were of a different substance, such as vaginal fluid. Tr. 308, 319-320.

ARGUMENT

1. Petitioner argues (Pet. 14-18) that he was denied due process because he was tried and convicted by a jury of fewer than six members who were not required to reach their verdict by a unanimous vote. Citing *Burch* v. *Louisiana*, 441 U.S. 130 (1979), which invalidated a conviction for a non-petty offense by only five members of a six-person jury, and *Ballew* v. *Georgia*, 435 U.S. 223 (1978), which invalidated a conviction for a non-petty offense by a five-person jury, petitioner argues that the same standards should apply to the military justice system and that his conviction should therefore be reversed.

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[1] The serologist testified that while most secretors have saliva and seminal typing consistent with their blood typing, that was not true in petitioner's case. The serologist therefore based his analysis on a comparison of petitioner's saliva sample and the specimens of semen obtained from the crime scene. Tr. 304; Pros. Exh. 8, at 2.

a. Petitioner's complaints about the makeup of the court-martial panel were not raised before the Air Force Court of Military Review. Moreover, although they were argued in the petition for grant of review to the Court of Military Appeals, those claims were not among the issues that the Court of Military Appeals accepted for review. Accordingly, it is not clear that those issues are subject to review by certiorari in this Court.

The statutes providing certiorari review of the judgments of the Court of Military Appeals, 10 U.S.C. 867a(a) (Supp. IV 1992) and 28 U.S.C. 1259(3) (Supp. IV 1992), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67a(a) of the UCMJ, 10 U.S.C. 867a(a) (Supp. IV 1992), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit decisions in any case to less than all the issues urged by the defendant. Article 67(c), UCMJ, 10 U.S.C. 867(c) (Supp. IV 1992). Since that court did not pass on those questions, there is a question whether that court rendered a "[d]ecision" on those questions within the meaning of the statutes authorizing this Court to review judgments of the Court of Military Appeals.

b. On the merits, there is no force to petitioner's constitutional challenge to the five-member court-martial panel or to the statutory authorization for nonunanimous verdicts in the military criminal justice system. The courts that have examined the question have uniformly upheld the military practice of convening court-martial panels with as few as five

members and the military practice of requiring only a two-thirds vote of the members to convict. See *Mendrano* v. *Smith*, 797 F.2d 1538 (10th Cir. 1986); *United States* v. *Allen*, 31 M.J. 572 (N.-M.C.M.R. 1990), aff'd, 33 M.J. 209 (C.M.A.), cert. denied, 112 S. Ct. 1473 (1992); *United States* v. *Curtis*, 32 M.J. 252 (C.M.A.), cert. denied, 112 S. Ct. 406, remanded on other grounds, 33 M.J. 101 (C.M.A. 1991), cert. denied, 112 S. Ct. 1177 (1992); *United States* v. *Mason*, 24 M.J. 127, 128 & n.* (C.M.A.), cert. denied, 484 U.S. 912 (1987); *Hutchinson* v. *United States*, 18 M.J. 281 (C.M.A.), cert. denied, 469 U.S. 981 (1984); see *United States* v. *McClain*, 22 M.J. 124, 128 (C.M.A. 1986).

Those decisions are correct. The statutes governing the number of members on court-martial panels and the number that must concur to return a verdict do not offend either the Fifth or the Sixth Amendment to the Constitution.

Petitioner seeks to impose on courts-martial the same requirements that Art. III, § 2, Cl. 3, and the Sixth Amendment impose in civilian cases. It is well settled, however, that the right to a jury trial that is guaranteed by those provisions does not apply to court-martial proceedings. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858).[2] The Fifth Amendment specif-

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[2] See also *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), overruled on other grounds, *Solorio* v. *United States*, 483 U.S. 435 (1987); *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950); *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942); *Kahn* v. *Anderson*, 255 U.S. 1 (1921); *Mendrano* v. *Smith*, 797 F.2d at 1544; *King* v. *Moseley*, 430 F.2d 732, 734 (10th Cir. 1970); *Branford* v. *United States*, 356 F.2d 876, 877 (7th Cir. 1966); *Owens* v. *Markley*, 289 F.2d

ically exempts "cases arising in the land or naval forces" from the requirement of an indictment by a grand jury for serious crimes. By drafting the Fifth Amendment in that manner, "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth." *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123. As the Court explained in *Ex parte Quirin*, 317 U.S. 1, 39 (1942), neither Section 2 of Article III of the Constitution nor the Sixth Amendment requires a trial by jury in the military, because those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law * * *, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right." Accordingly, because petitioner had no Article III or Sixth Amendment right to a trial by a petit jury, he also had no right under those provisions to a unanimous vote by a jury composed of at least six persons.

Petitioner's claim fares no better under the Due Process Clause. The Constitution authorizes Congress to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8,

751, 752 (7th Cir. 1961). See *De War* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate the Sixth Amendment). See generally Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

Cl. 14, and grants Congress "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States*, 483 U.S. 435, 447 (1987). See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). Congress's judgment about the composition and voting procedures of a court-martial is entitled to special deference, not only because "[t]he constitution of courts-martial, like other matters relating to their organization and administration * * *, is a matter appropriate for congressional action," *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950),[3] but also because the practices at issue have been carried forward from the earliest days of our nation. Cf. *Solorio* v. *United States*, 483 U.S. at 447.

The nation's first military law was the American Articles of War of 1776. 1 & 2 W. Winthrop, *Military Law and Precedents* 47, App. 961-971 (2d ed. 1920). Section 14, Art. 1, provided that at least 13 officers would serve on general courts-martial. Several years later, when large numbers of desertions and an understaffing of officers had become a particularly acute problem for commanders at frontier outposts, Congress amended the American Articles of War to permit a quorum of five officers at a general court-martial when 13 members could not be detailed "without manifest injury to the service." 30 J. Continental Cong. 145, 316 (J. Fitzpatrick ed. 1934); 1 & 2 W. Winthrop, *supra*, at 22-23, App. 972; Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57

[3] See also *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981) (the decisions of Congress are entitled to particular deference when they involve "Congress' authority over national defense and military affairs").

Cornell L. Rev. 363, 384-385 n.118 (1972). As a result, court-martial panels often consisted of fewer than 13 members. See *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 34-35 (1827).

Congress endorsed that practice throughout the 19th century and the early part of the 20th century when revising the Articles of War. 1 & 2 W. Winthrop, *supra*, at 77, 159; American Articles of War of 1806, ch. 20, § 1, art. 64, 2 Stat. 367, *reprinted* in 1 & 2 W. Winthrop, *supra*, App. 981-982; American Articles of War of 1874, art. 75, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 992; American Articles of War of 1916, ch. 418, art. 5, 39 Stat. 651. In the aftermath of World War II, Congress replaced the Articles of War with the Uniform Code of Military Justice. In so doing, Congress retained the requirement of a quorum of five members for general courts-martial, as well as the convening authority's discretion to detail a greater number of panel members, the system that exists today. Art. 16, UCMJ, 10 U.S.C. 816 (1982 & Supp. V 1987).

History also shows that unanimous verdicts have never been a necessary element of court-martial proceedings. The American Articles of War of 1776, like their predecessor, the British Articles of War, required only a simple majority vote to convict a defendant and a two-thirds majority to sentence him to death. American Articles of War of 1776, § 14, art. 5, *reprinted in* 5 J. Continental Cong. 801 (W. Ford ed. 1906); 1 & 2 W. Winthrop, *supra*, at 377, App. 968; A. Macomb, *A Treatise on Martial Law and Courts-Martial* 144 (1809). Congress thereafter repeatedly endorsed similar majority vote requirements in stat-

utes passed in 1800, 1806, 1862, and 1874.[4] Throughout the nineteenth century, a majority vote of the panel members was sufficient to convict a defendant of a noncapital crime, with a two-thirds vote sufficient to impose capital punishment. 1 & 2 W. Winthrop, *supra*, at 377; *Stout* v. *Hancock*, 146 F.2d 741, 742-743 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945).

Early in the 20th century, Congress modified the voting requirements for Army courts-martial, requiring a unanimous vote to impose the death penalty or to convict a defendant of a crime carrying a mandatory death penalty. Act of June 4, 1920, ch. 227, art. 43, 41 Stat. 795-796; *Stout* v. *Hancock*, 146 F.2d at 741-743. For all other crimes, conviction required only a two-thirds majority. At the same time, the voting requirements for courts-martial in the Navy were left untouched. Thus, only a simple majority was necessary to convict a sailor, and a two-thirds majority to impose the death penalty. See H.R. Rep. No. 491, 81st Cong., 1st Sess. 26, 74 (1949). When considering the UCMJ following World War II, Congress adopted Article 52(a) of the UCMJ, 10 U.S.C. 852(a), in substantially its present form, so that an accused may be convicted on a two-thirds vote of the court-martial panel, except in the case of an

[4] Act of Apr. 23, 1800, ch. 33, § 1, art. 41, 2 Stat. 51 (An Act for the better government of the Navy of the United States); American Articles of War of 1806, ch. 20, § 1, art. 87, 2 Stat. 369, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 984; Act of July 17, 1862, ch. 204, art. 19, 12 Stat. 605 (An Act for the better Government of the Navy of the United States); American Articles of War of 1874, art. 96, *reprinted in* 1 & 2 W. Winthrop, *supra*, App. 994.

offense carrying a mandatory penalty of death, in which event the panel must be unanimous.

In 1986, the President modified the *Manual for Courts-Martial* to limit the imposition of the death penalty to those cases in which the court-martial panel members unanimously find the defendant guilty of an offense for which Congress has authorized the death penalty, and then only if the court finds at least one enumerated aggravating factor. Rule 1004, *Manual*; Exec. Order No. 12,550, 3 C.F.R. 192 (1986 comp.). Neither Congress nor the President sought to extend the unanimity requirement to other situations, however. In sum, it is clear that the five-member, two-thirds majority vote procedures in Articles 16(1)(A) and 52(a)(2) of the UCMJ, 10 U.S.C. 816(1)(A) and 852(a)(2) (1982 & Supp. V 1987), represent the longstanding and considered judgment of Congress and the Executive on the proper balance to be struck between the rights of an individual serviceman and the special needs of the armed forces.

That judgment is a reasonable one. The essential function of the military is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955). When servicemembers are diverted from that function by the need to serve as court-martial panel members, "the basic fighting purpose of armies is not served." *Ibid.* Congress therefore has determined that the diversion of resources necessary to conduct the retrials that would result from a unanimous verdict requirement is too high a price to pay in terms of lost military preparedness. Accordingly, Congress provided for only one trial, at which a two-thirds majority vote would suffice to convict.

That "one-trial" system does not exclusively favor the prosecution. The rule that no retrials are permitted in the military if there is a "hung jury" provides a defendant with "a significant recompense" for the disadvantages of not requiring a unanimous verdict. *Mendrano* v. *Smith*, 797 F.2d at 1546. Moreover, as a safeguard against an inaccurate verdict by a court-martial panel, the military courts have required the prosecution independently to prove the defendant's guilt before a court of military review. The standard of review applied by a court of military review to determine whether the evidence is sufficient to support the defendant's conviction substantially differs from, and is more generous to military defendants than, the standard employed by civilian appellate courts. A civilian appellate court does not inquire whether it believes that the evidence is sufficient to prove the defendant's guilt beyond a reasonable doubt, but instead only determines "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). By contrast, a court of military review must independently review the record and be convinced of the correctness of the court-martial panel's findings, including its ultimate finding that the accused is guilty, before the findings may be upheld. Art. 66(c), UCMJ, 10 U.S.C. 866(c).[5]

[5] A court of military review may affirm "only such findings of guilty * * * as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. 866(c). Although nothing in the

Finally, petitioner argues that the nonunanimous verdict of a five-member court-martial violates due process because such a verdict is inherently unreliable. The court reached that conclusion for civilian cases based on the studies cited in the lead opinion in *Ballew* v. *Georgia*, 435 U.S. at 231-243 (opinion of Blackmun, J.), regarding the group dynamics of civilian juries. Much of the same reasoning formed the basis for the decision in *Burch* v. *Louisiana*, 441 U.S. at 138. There are no comparable studies, however, that have addressed the dynamics of courts-martial panels. In light of the functional and compositional differences between civilian juries and court-martial panels, the studies on which *Burch* and *Ballew* relied are not obviously applicable to the military setting. *United States* v. *Guilford*, 8 M.J. 598, 601-602 (A.C.M.R. 1979), petition for review denied, 8 M.J. 242 (C.M.A. 1980).[6] Given the special

text of the statute or its legislative history suggests that the courts of military review must independently apply the "beyond a reasonable doubt" standard to the record when reviewing the sufficiency of the evidence, see *Jackson* v. *Taylor*, 353 U.S. 569, 577 & n.8 (1957), the military courts have read that standard into the Act. *E.g.*, *United States* v. *Palenius*, 2 M.J. 86, 91 n.7 (C.M.A. 1977).

[6] In *Burch*, the Court concluded that juries must have at least six members, in part "to provide a fair possibility that a cross section of the community would be represented." 441 U.S. at 135, citing *Williams* v. *Florida*, 399 U.S. 78, 100 (1970). That goal is inapplicable to courts-martial. The members of a civilian jury are selected at random to represent a cross-section of the community. By contrast, the members of the court-martial panel are deliberately chosen on the basis of their qualifications to sit as panel members. Art. 25, U.C.M.J., 10 U.S.C. 825 (1982 & Supp. V 1987).

deference due to Congress's judgments in this area, the question whether studies of the type relied upon in *Ballew* justify a change in the UCMJ should be left to Congress. See Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177 (1984).

c. There is also no merit to petitioner's claim regarding the method of selecting the court-martial members. A serviceman has no right to a court-martial panel randomly selected from a pool containing all servicemen, including enlisted personnel of the same rank as the defendant. *De War* v. *Hunter*, 170 F.2d 993, 997 (10th Cir. 1948), cert. denied, 337 U.S. 908 (1949) (court-martial panel composed exclusively of officers to try an enlisted man does not violate Sixth Amendment); *United States* v. *McClain*, 22 M.J. at 128 (Sixth Amendment cross-section requirement inapplicable to court-martial proceedings); see *Mendrano* v. *Smith*, 797 F.2d 1544-1547; *United States* v. *Carter*, 25 M.J. 471 (C.M.A. 1988); *United States* v. *Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988).

As to petitioner's argument that minorities were unfairly underrepresented on petitioner's court-martial panel, there is no indication that there was any ethnic or racial bias in the process used to select the panelmembers for petitioner's court-martial. Indeed, two of the nine prospective panelmembers in this case were minorities. See Tr. 125-126. But petitioner challenged both of them—one for cause and the other peremptorily. Tr. 207, 211. Petitioner was therefore solely responsible for keeping the two minority members of the pool from being on his panel. See Tr. 125-126.

In short, petitioner presented no evidence of racial discrimination in the selection of court members, no evidence of the racial makeup of the base community, and no evidence of racial bias in the use of peremptory challenges. See Tr. 120-123, 211; App. Exh. X. Under those circumstances, petitioner has failed to show that there was any constitutional infirmity in the method by which his court-martial panel was selected.

2. Petitioner argues (Pet. 18-20) that the information on which the search authorization was granted did not amount to probable cause. His argument ignores the information known to the investigating agents and the reasonable inferences from that information.

The identification of petitioner as the late evening caller who told Nantkes (apparently falsely) that her blinds were open focused attention on him as a suspect. That focus was substantially enhanced by the match between the race and size of the late evening caller and the apparent race and size of the rapist, as reported by Nantkes. The force of that report was further enhanced by the fact that Nantkes reported that both the late evening caller and the rapist were approximately 5'4" in height—quite small for a man. Finally, the rapist took several items, including a nightgown, from Nantkes's room, and it was reasonable for the officers and the commander who authorized the search to conclude that there was probable cause that petitioner committed the rapes and that evidence would be found in petitioner's room. Because the showing of probable cause turned in part on the similarity between the identification of the late night caller and the rapist, it was not, as petitioner

claims, dependent entirely on innocent conduct that did not tend to identify petitioner as the rapist.

Even if the evidence known to the officers and conveyed to the commander at the time of the search authorization did not constitute probable cause, the question of probable cause was, at worst, a debatable one. It was therefore reasonable for the investigating officers to rely on the search authorization that they secured. For that reason, even if the search was not supported by probable cause, the nightgown and the note containing Nantkes's name would be admissible under Mil. R. Evid. 311(b)(3), the military equivalent of the good faith exception to the exclusionary rule.

3. Petitioner next asserts (Pet. 20-22) that the court of military appeals misunderstood the serological evidence and therefore failed to appreciate how strong that evidence was in supporting petitioner's claim of innocence. In fact, however, petitioner has not shown that the serological evidence significantly supported his claim of innocence, and he has failed completely to explain the highly incriminating physical evidence found in his room the day after the rapes.

Petitioner's argument regarding the serological evidence fails to acknowledge the serologist's testimony that petitioner's blood type did not match the type of his other body fluids. For that reason, the serologist compared the semen samples with petitioner's saliva specimen, not his blood specimen. For one of the two tests that the serologist conducted, petitioner's saliva type matched the semen specimen. For the other test, the two did not match, but the serologist explained that the failure of that test to produce a match could have been attributable to

deterioration of the pertinent enzyme in the sample or contamination of the sample by other fluids on the surfaces from which the samples were taken. Accordingly, the serologist's testimony did not exculpate petitioner at all. To the contrary, that evidence did nothing to rebut the powerful force of the other evidence in the case, including the physical evidence found in petitioner's room.

4. Finally, petitioner presents (Pet. 22-30) the two issues that are pending before this Court in *Weiss* v. *United States*, No. 92-1482 (argued Nov. 3, 1993). Those claims are: (1) that the military trial and appellate judges in his case were not qualified to hold those positions because they were appointed to them by the Judge Advocate General in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2; and (2) that his trial and his appeal to the court of military review were fundamentally unfair because the military judges sitting on those courts do not enjoy fixed terms of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges.

Because those questions are pending before the Court in *Weiss* v. *United States*, *supra*, the petition should be held until the Court has decided *Weiss* and should then be disposed of as appropriate in light of the Court's decision in that case.

CONCLUSION

With respect to questions 4 and 5, the petition for a writ of certiorari should be held pending this Court's decision in *Weiss* v. *United States*, No. 92-1482, and then disposed of as appropriate in light of the Court's

decision in that case. In all other respects, the petition should be denied.

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